

No. 78-62

Supreme Court, U. S.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1978

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NORDBY SUPPLY COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT*

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**MEMORANDUM FOR THE UNITED STATES  
IN OPPOSITION**

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WADE H. MCCREE, JR.,  
*Solicitor General,  
Department of Justice,  
Washington, D.C. 20530.*

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Petitioner seeks review of the decision below holding that its wholesale sales of fishing lures were subject to excise tax under Section 4161(a) of the Internal Revenue Code of 1954, as amended (26 U.S.C.).

The pertinent facts are as follows: Petitioner was an importer and wholesaler of fishing lures. It sold the lures to dealers who, in turn, sold them primarily to commercial fishermen. The lures were packaged without hooks in groups of ten, and bore the designation "(DESIGNED AND SOLD FOR COMMERCIAL FISHING ONLY)", or a similar statement. The lures were identical in makeup and appearance to lures used in recreational fishing. In fact, recreational fishermen purchased 20 percent of the lures (Pet. App. C, pp. A-5 to A-6).

Section 4161(a) of the Internal Revenue Code of 1954 imposes an excise tax on sales of various items of fishing

equipment, including artificial lures, by manufacturers, producers or importers. On audit, the Commissioner of Internal Revenue imposed the excise tax upon petitioner's sales of lures and rejected petitioner's contention that the tax applied only to fishing equipment used in sport fishing and not in commercial fishing. After paying the amount in dispute, petitioner brought this refund suit in the United States District Court for the Western District of Washington. The district court upheld petitioner's claim and awarded it 80 percent of the tax paid. While the language of Section 4161(a) does not distinguish between sport fishing and commercial fishing, the district court found this distinction was implied in the statute because Section 4161(a) is set forth in a subchapter and in a part of the Code respectively entitled "Recreational Equipment" and "Sporting Goods." In the district court's view, Congress did not intend to impose an excise tax upon fishing lures used in commercial fishing. Finally, the district court concluded that the Commissioner's own regulations supported petitioner's claim that commercial fishing equipment was exempt from tax (Pet. App. D, pp. A-8 to A-10).

The court of appeals reversed (Pet. App. A, pp. A-1 to A-3). It held that Section 4161(a) does not distinguish between sport fishing and commercial fishing. Moreover, it found no support for such a distinction in either the legislative history or the Treasury Regulations. As the court stated, "[t]o hold that the imposition of the tax on the manufacturer depends on the character of the use by the ultimate consumer would cause great and unnecessary difficulties in tax collection. We decline to create these difficulties and we do not think that Congress intended to do so" (Pet. App. A, p. A-3).

1. The court of appeals correctly held that the plain language of Section 4161(a) does not distinguish between

sport fishing and recreational fishing. That provision, which was first enacted in 1917, imposes a tax upon the sale of "artificial lures" by a manufacturer, producer or importer, without qualification as to the purpose for which the lures may be used or sold. This conclusion is consistent with the longstanding administrative interpretation of the statute that an item is taxable if it is described in that section and is suitable for recreational use, whatever the purpose for which the item may be sold or used.<sup>1</sup> Moreover, Section 7806(b) provides that nothing is to be inferred from the grouping or indexing of any particular section of the Code. Accordingly, the fact that Section 4161(a) is located in a subchapter and in a part respectively entitled "Recreational Equipment" and "Sporting Goods" does not alter the plain meaning of the statute. *Pike v. United States*, 340 F. 2d 487 (C.A. 9).<sup>2</sup>

2. Finally, petitioner relies (Pet. 7) upon a statement in the committee report pertaining to the 1965 Excise Tax Reduction Act,<sup>3</sup> that the tax on fishing equipment would

<sup>1</sup>See, e.g., Rev. Rul. 54-320, 1954-2 Cum. Bull. 411, superseded by Rev. Rul. 64-339, 1964-2 Cum. Bull. 429; Rev. Rul. 57-472, 1957-2 Cum. Bull. 731, declared obsolete by Rev. Rul. 69-227, 1969-1 Cum. Bull. 315.

<sup>2</sup>*Commerce-Pacific, Inc. v. United States*, 278 F. 2d 651 (C.A. 9), certiorari denied, 364 U.S. 872, upon which petitioner relies (Pet. 5), is not to the contrary. There, the court held, as it did in the decision below, that "[t]he statute does not limit the tax to items used in 'sport fishing' " and that no such limitation can be implied from the titles ("Recreational Equipment" and "Sporting Goods") under which it is found (see 278 F. 2d at 653).

Contrary to petitioner's further argument (Pet. 6), Treasury Regulations on Manufacturers and Retailers Excise Taxes (1954 Code), Section 48.4161(a)-1 (26 C.F.R.), does not support its claim to exemption. As the court of appeals pointed out, the Regulation speaks of the tax as applying to those articles designed for use in the "sport of fishing" in order to exclude those articles that "are actually toys or novelties" and not constituted for practical use (Pet. App. A, p. A-3).

<sup>3</sup>H.R. Rep. No. 433, 89th Cong., 1st Sess. 25-26 (1965).

continue because the revenues were used to aid states in fish restoration and management of fish having a material value for sport and recreation. But as the court below explained (Pet. App. A, pp. A-2 to A-3), commercial fishermen also benefit from those conservation programs and should likewise share in their cost. Accordingly, the statement in the committee report does not establish a congressional preference for commercial over sport fishermen.<sup>4</sup>

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,  
*Solicitor General.*

AUGUST 1978.

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<sup>4</sup>Section 4181 of the Code similarly imposes a tax upon the sale of firearms by a manufacturer, producer or importer. Although the legislative history states that the revenue from Section 4181 will be used for wildlife preservation, and the section is found under the same subchapter ("Recreational Equipment"), Section 4181 is likewise not limited to sales of firearms for use in sport or recreational activities. The fact that sales of firearms for commercial use are subject to tax is made evident by Section 4182(b), which exempts from tax the sale of firearms to the Department of Defense.